DOCKET FILE COPY ORIGINAL

ORIGINAL RECEIVED

Before the PEDERAL COMMUNICATIONS COMMISSION Washington, D. C. 20554

APR 6 - 1993

OFFICE OF THE SECRETARY

In re Applications of) MM No. 93-41
TRIAD FAMILY NETWORK, INC. Winston-Salem, North Carolina Channel 207C3) BPED-910227MD
POSITIVE ALTERNATIVE RADIO, INC. Asheboro, North Carolina Channel 207A) BPED-911119MC
For Construction Permit for a New Noncommercial Educational FM Station)))

TO: Administrative Law Judge

Joseph P. Gonzalez

PETITION TO DISMISS TRIAD APPLICATION

	Positive	Alternative	Radio,	Inc.	("Radio"),	through	its
	m1	! * !	L. .	1 31	4 4	A2 2	44 -
1							
<u> </u>							
r.					<u> </u>		
-							

days after the date established for filing notices of appearance" (§1.325(c)) or by April 5, 1993.

Radio hand delivered to counsel for Triad copies of its Standard Document Production materials and its Standardized Integration Statement by April 5, 1993.

Triad has produced neither materials listed in the Standard Document Production Order, nor a Standardized Integration Statement.

The Commission stated in a <u>Memorandum Opinion and Order</u>, Gen. Doc. 90-264, released May 15, 1991 (FCC 91-154) at footnote 3:

With further regard to the standardized document production order and integration statement, we agree with the FCBA's comment that disputes over the sufficiency of an exchange should not be elevated to a question of whether an applicant should be dismissed. However, a failure to exchange any materials would constitute a failure to prosecute, resulting in the dismissal of an applicant. . .

No exceptions are made by the Commission. It should be noted that the language is mandatory: "...would constitute a failure to prosecute...", not "could" or "may" or "might". Instead of

7

A	

Nor do the Hearing Designation Orders waive the required compliance with \$1.325(c) of the rules. The ruling of the Presiding Judge in MM Docket 92-116 is not binding in this proceeding, and it may be noted, MM Docket 92-116 did not involve

		 			•
			-		
<u> </u>					
1					
* ;					
- X,					
Y-					
· -					
			<u>.</u> .		
-			<u></u>		
· ·					
R				/ E37-	
	- 12-				
					-
E 1-3	-				
<u> </u>					

to void that rule. Triad has failed to comply with it, and accordingly is guilty of a failure to prosecute its application. Pursuant to the above-quoted Commission admonition, Triad's application must be dismissed.

Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

Bv

Julian P. Freret

Its Counsel

BOOTH, FRERET & IMLAY 1233 20th Street, N. W. Suite 204 Washington, D. C. 20036 (202) 296-9100

April 6, 1993

Federal Communications Commission

DOCKET FILE GORYA

FOO MAIL SECTION

HEARING DESIGNATION ORDER

	Before the	<u>A - 1</u> 2 34 - 34 - 1001.	Dalamand T 17 1001
Na. 1			
<u> </u>			

W			
\ -			
•			
_			
	ŀ		
1 <u> </u>	·		
H			
Luc			
<u> </u>			
·			
1 Access 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	,		
,			

plicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof: and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

- 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
- 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.
- 8. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to LIU as a result of this proceeding, its grant will be subject to whatever action, if any, the Commission may deem appropriate, in light of the outcome of the complaint proceedings listed in paragraph 3 above.
- 9. IT IS FURTHER ORDERED. That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch. Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.
- 10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.
- 11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief Audio Services Division Mass Media Bureau

Before the Federal Communications Commission Washington, D.C. 20554

MM Docket No. 92-116

In re Applications of

UHURU File No. BRED-910130WF

For Renewal of License of Station WUCI-FM Binghamton, New York

COMMUNICATIONS, INC.

and

WSKG PUBLIC File No. BPED-910501MB TELECOMMUNICATIONS COUNCIL

For a Construction Permit for a New FM Station Binghamton, New York

ARROWHEAD CHRISTIAN CENTER

File No. BPED-910501MC

For a Construction Permit for a New FM Station Binghamton, New York

HEARING DESIGNATION ORDER

Adopted: May 15, 1992;

Released: June 8, 1992

By the Chief, Audio Services Division, Mass Media Bureau:

- 1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, has before it for consideration: (a) the application of Uhuru Communications, Inc. (Uhuru) for renewal of license of Station WUCI-FM, Binghamton, New York, and (b) the applications of WSKG Public Telecommunications Council (WSKG) and Arrowhead Christian Center (Arrowhead) for a construction permit for a new FM station on Channel 218A at Binghamton, New York. All three applications are mutually exclusive because WUCI-FM is currently licensed to operate on Channel 218A.
- 2. Uhuru's Silence. By notification dated April 2, 1991, from the Chief, FM Branch, Audio Services Division, Mass Media Bureau, special temporary authorization was

to remain silent. Since that time the station has been off the air without permission. Additionally, NTIA has reclaimed much of its equipment from WUCI-FM which precludes the licensee's ability to broadcast. Because the licensee has been off the air for an extended period of time without authorization, lacks the equipment to operate the station, does not have Commission permission to remain off the air, and has not turned in its license, it is in apparent violation of 47 C.F.R. §§ 73.1740 and 73.1750. Accordingly, an appropriate issue will be specified against Uhuru.

- 3. WSKG's Site Availability. WSKG proposes to operate at the same site as the renewal applicant. However, in the First Report and Order In the Matter of Formulation of Rules and Policies... Relating to the Comparative Renewal Process, the Commission rescinded the Cameron¹ presumption, stating "[i]f a renewal challenger is unable to provide reasonable assurance of transmitter site availability this will be designated as an issue in the comparative proceeding." 4 FCC Rcd 4780, 4788-89 (1989). Since WSKG has failed to provide reasonable assurance that Uhuru's site will be available to it, an appropriate issue will be specified.
- 4. Environmental Issues. Our engineering study indicates that all three applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the Report and Order in Gen. Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, Public Notice entitled Guidance for Broadcasters Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Therefore, each will be required to file, within 30 days of the receipt of this Hearing Designation Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See Golden State Broadcasting Corp., 71 FCC 2d 2289 (1979), recon. denied sub nom. Old Pueblo Broadcasting Corp., 83 FCC 2d 337

Federal Communications Commission

. <u>. </u>	based on its analysis of the Environmental Assessments	spective applicants; and (c) whether other factors in
		<u></u>
, <u>, , , , , , , , , , , , , , , , , , </u>		
<u>,</u>		
	f -	
1		
4		
<i>#</i>		
	<u> </u>	
<u>.</u>	· .	
	-	
·	<u>-</u> -	
4 ·		
. . .	<u> </u>	•
*- =		
· 0.		
·		
F ·		
r		

CERTIFICATE OF SERVICE

I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing **PETITION TO DISMISS TRIAD APPLICATION** were mailed this 6th day of April, 1993, to the offices of the following:

*Administrative Law Judge Joseph P. Gonzalez Federal Communications Commission 2000 L Street, N. W., Room 221 Washington, D. C. 20554

*Norman Goldstein, Esquire
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N. W., Room 7212
Washington, D. C. 20554

*Chief, Data Management Staff Audio Services Division Mass Media Bureau Federal Communications Commission 1919 M Street, N. W., Room 350 Washington, D. C. 20554

B. Jay Baraff, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N. W.
Suite 300
Washington, D. C. 20015-2003